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Proposed Regulations for The Packers & Stockyard Act: 90 years in the making, but is the USDA ahead of itself already?

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Proposed Regulations for The Packers & Stockyard Act: 90 years in the making, but is the USDA ahead of itself already?

Abstract: This paper takes a look at regulations proposed by the USDA last June pursuant to its authority under the Packers & Stockyard Act of 1921. The Packers & Stockyard act was passed shortly after the FTC Act and was meant to aid in enforcing the antitrust laws in the meatpacking sector. After ninety years without regulations, several courts of appeals recently began pushing back on the USDA's interpretation of the Act and begin requiring additional proof beyond what the USDA felt was necessary. In response, and at the urging of Congress, the USDA proposed the rules addressed in this paper. After their proposal, industry participants and Congress voiced concern that the regulations stretched too far. Due to the substantial change proposed by these regulations, a complete review of all proposed changes is beyond the scope of this paper. I examine parts of the regulations in light of other laws and antitrust policies previously enforced. I conclude that some of the proposed regulations are nothing more than agricultural versions of laws that exist in other industries while other regulations appear unprecedented and should be interpreted narrowly.

“The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind.”¹

Antitrust has a naturally agrarian beginning. Near the end of the 19th century, farmers were especially concerned about the growing “grave evil” of the

¹ Page Smith, THE RISE OF INDUSTRIAL AMERICA: A PEOPLE'S HISTORY OF THE POST-RECONSTRUCTION ERA 466 (1984) (stating the Omaha platform).

“vast fortunes [developing] in single hands.”² Stories raged of the consolidated and powerful packers forcing prices down for farmers until they had to fold or be absorbed.³ Concerns grew so great that Nebraska, for the first time in thirty-one years, voted a democrat into office to combat the trusts.⁴ This concern continued on into the early 20th century and received Congressional action through the Sherman and Clayton Acts. To show support for farmers, the Clayton Act proceeded to slow down merging agricultural firms yet exempted non-stock farmer cooperatives, theoretically allowing farmers to slightly increase their market power.⁵ In fact, the Federal Trade Commission’s (FTC) first investigation targeted the five largest meatpacking firms in the US.⁶ Farmers were impressed with this display of action and strength.⁷ Based on the FTC’s report, Congress closely examined the meatpacking industry and passed the Packers & Stockyards Act (PSA) of 1921, which, in part, prohibited meatpackers from engaging in or using any “unfair, unjustly discriminatory, or deceptive practice or device in commerce.”⁸ This language is eerily similar to Section 5 of the FTC Act, a statute believed to reach farther than any previous antitrust law.

² Page Smith, *The Rise of Industrial America: A People’s History of the Post-Reconstruction Era* 132 (1984) (quoting Democrat George Hoar of Mississippi).

³ *Meat-Packer Legislation, Hearings Before the Committee on Agriculture*, House of Representatives, 66th Cong., 2d Sess. 2211 (1920).

⁴ Page Smith, *The Rise of Industrial America: A People’s History of the Post-Reconstruction Era* 465 (1984) (the democrat was William Jennings Bryan).

⁵ Clayton Act, 15 U.S.C. § 17 (2010).

⁶ G. Cullom Davis, *The Transformation of the Federal Trade Commission, 1914-1919*, *Miss. Valley Hist. Rev.*, Dec. 1962, at 441.

⁷ *Id.*

⁸ Packers & Stockyards Act of 1921, 7 U.S.C. § 181-231 (2010).

However, since their passage nearly a century ago, the antitrust laws have not completely lived up their promise.⁹ The agricultural marketplace continues to consolidate with market shares continuing to rise.¹⁰ In an attempt to prevent some of the evils that accompany such consolidation, the USDA recently proposed regulations defining what constitutes violations of the PSA.¹¹ However, the timing was not due purely to the ideals of helping farmers. After nearly ninety years of silence, these regulations arose due to an increasing number of courts placing limits on what violates the PSA. While revolutionary already because of its late timing, the proposed regulations also caught attention because of their sweeping declaration about what constitutes ‘unfair.’ Since enforcement of the PSA falls on both the USDA¹² and private individuals,¹³ these regulations require careful consideration lest they swamp the agricultural industry with lawsuits.

The PSA’s History

The PSA makes it unlawful for packers¹⁴ to:

⁹ Jon Lauck, *Toward an Agrarian Antitrust: A new direction for Agricultural Law*, 75 N. Dak. L. Rev. 449 (1999) (generally describing the failure of existing antitrust laws).

¹⁰ *Id.* at 455. This increase in the market share of a few only furthers the already present imbalance of bargaining power. Economic indicators hint that this imbalance does not further consumer or market welfare. For example, from 1984 to 1999, consumer prices on food rose by 3 percent while payments made to farmers decreased by 36 percent. *Id.* at 455-56.

¹¹ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201).

¹² 7 U.S.C. § 210 (2010).

¹³ 7 U.S.C. § 209 (2010) (private right of action created by Pub. L. No. 94-410, § 6, 90 Stat. 1249, 1250 (1976)).

¹⁴ The PSA originally applied only to the livestock and meat packing industries. Since then Congress added two more industries. Live poultry dealers were added in 1935, *see* Pub. L. No. 74-272, 49 Stat. 648 (1935), and swine contractors were added in 2002, Pub.

- a. Engage in or use any unfair, unjustly discriminatory, or deceptive practices or device; or
- b. Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever;¹⁵

The dictionary definitions at the time of the act's passage similarly offer no assistance. 'Deceptive,' 'unfair,' 'unjust,' 'undue,' and 'unreasonable' are terms as vague now as they were then.¹⁶ As such, the definitions do not help determine the scope of sections 202(a) or (b).

Comparing sections 202(a) and (b) to the other sections may provide some clarity. The three additional restrictions that exist in section 202 notably include language related to "creating a monopoly" or "restraining trade,"¹⁷ language not present in sections (a) and (b). Without such language, many questions surround what sections (a) and (b) prohibit. Yet, despite this

L. 107-171, S. 10502(b)(1), 116 Stat. 134, 509 (2002). However, despite these additions, the PSA still remains considerably more focused than the Sherman, Clayton, and Federal Trade Commission Acts. For this paper, Packers will refer to all of these groups. The term 'growers' will also be used to refer to the various farmers these packers interact.

¹⁵ Packers & Stockyards Act of 1921, ch. 64 § 202(a)-(b), 42 Stat. 159, 161 (1921) (codified as amended at 7 U.S.C. § 192(a)-(b) (2010))

¹⁶ At the time of the PSA's passage, "deceptive" was defined as "[t]ending to deceive; having power to mislead, or impress with false opinions"; "unfair" as "[n]ot fair in act or character; disingenuous; using or involving trick or artifice; dishonest; unjust; inequitable" (2d. definition); "unjust" as "[c]haracterized by injustice; contrary to justice and right; wrongful"; "undue" as "[n]ot right; not lawful or legal; violating legal or equitable rights; improper" (2d. definition); and "unreasonable" as "[n]ot conformable to reason; irrational" or "immoderate; exorbitant." *Webster's New International Dictionary* 578, 2237, 2238, 2245, 2248 (1st ed. 1917).

¹⁷ 7 U.S.C. § 192(c)-(e) (2010).

ambiguity, Congress has not sought to clarify the language despite passing several amendments over the decades. To aid in understanding sections 202(a) and (b), it helps by beginning with some history on the origin of the PSA.

The livestock industry's structure called out for regulatory intervention even a century ago. Since the beginning of the industrial age, it has contained a fundamental imbalance in bargaining power. Due to factors including the high number of sellers and the few number of buyers, the perishability of the food, and a consistent reluctance of farmers to band together, this imbalance has played a significant role in the industry's development and build up to the PSA's passage.¹⁸

[P]ersistent worries about the concentration problem and farmer bargaining power led to passage of the Clayton Act and the Federal Trade Commission Act in 1914. Agrarian concerns inhere in both statutes. The Clayton Act specifically limits the concentration that alarmed farmers, and it confers an antitrust exemption upon farmer efforts to organize themselves economically. The Federal Trade Commission Act created the Federal Trade Commission (FTC) with high expectations that some action would be taken against the "Big Five" meatpackers.¹⁹

Despite focusing on the problem, Congress quickly realized that the nation's existing antitrust laws²⁰ were ineffective to adequately address these problems.²¹

Nonetheless, Congress use "[t]he resulting FTC report on the meatpacking

¹⁸ Michael Stumo & Douglas O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 15 Drake J. Agric. L. 91, 92-93 (Spring 2003).

¹⁹ Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. Rev. 449, 485-87 (1999).

²⁰ The Sherman Act, the Clayton Act, and the FTC Act.

²¹ *Current Legislation*, 22 Colum. L. Rev. 68, 69 (1922).

industry [as] the rationale for Congressional efforts to scrutinize closely the packing industry.”²²

One of the first cases filed by the newly created FTC was against the Big Five.²³ The FTC settled the case the same day it filed the complaint. In the settlement, the packers agreed to a consent decree that restricted them from owning or controlling the livestock channels.²⁴ However, even the consent decree did not appease the politicians.²⁵

Congress passed the PSA in 1921 based on the Federal Trade Commission’s six-volume report explaining how the “Big Five” packinghouses dominated meatpacking markets.²⁶ This large report and numerous Congressional hearings created a voluminous record containing fodder for selective reading and the creation of several legislative histories.²⁷ However, some statements are agreed upon by almost all. No one denies that Congress passed the PSA after this country’s three primary antitrust laws: the Sherman,

²² Jon Lauck, *supra* note 19.

²³ *US v. Swift & Co.*, 189 F. Supp. 885, 888 (N.D. Ill. 1960) (discussing the 1920 litigation).

²⁴ *Id.* at 890.

²⁵ The lack of appeasement was odd because the consent decree virtually made the Attorney General the head of all meatpacking. *Supra*, note 21 at 69-70.

²⁶ Fed. Trade Comm’n, Report of the Federal Trade Commission on the Meat-Packing Industry (1919).

²⁷ *Compare Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 360-62 (5th Cir. 2009) (arguing statements from members of Congress and then-Secretary of Agriculture Henry C. Wallace demonstrate “the legislative debate surrounding the PSA supports the conclusion that it was designed to combat restraints of trade.”) *with id.* at 378-79 (Garza, J., dissenting) (arguing that the PSA’s legislative history does not support requiring plaintiffs to show an adverse impact on competition because history reveals the PSA also aimed at protecting individual producers from “unfair” and “unjustly discriminatory practices”).

Clayton, and Federal Trade Commission Acts. Nor does anyone seriously contest that it is fair to deduce that Congress felt the previous antitrust legislation was “not broad enough to meet the public needs as to business practices of packers.”²⁸ How much broader Congress meant the PSA to act is unknown. However, support can be pulled from the history that shows both a focus preventing unreasonably high meat prices to consumers and prevention of unreasonably low prices to livestock producers.²⁹ These two goals provide quite different justifications for the purpose of the law. Which one is correct makes a small difference on how the new regulations should be understood.

Since there is no definitive answer to the question, we should next turn our attention to how courts have implemented both the PSA and other antitrust laws. After all, while separate from other antitrust laws, courts recognized that previous cases implementing those laws could be instructive.³⁰

Questioning the Reach of the PSA

Included in the FTC Act is language similar to section 202 of the PSA.³¹ The FTC Act similarly offers no direction on what acts should be considered ‘unfair.’ In allowing the FTC to proscribe “unfair methods of competition” Congress provided the power to “define and proscribe an unfair competitive

²⁸ *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961); *See* Donald Campbell, *The Packers and Stockyard Act Regulatory Program*, in *Agricultural Law* 186-87 (John E. Davison ed., 1981).

²⁹ *Pilgrims Pride*, 591 F.3d at 378-89 (Garza, J., dissenting) (highlighting the confusing history of the PSA).

³⁰ *Wilson & Co. v. Benson*, 268 F.2d 891, 895 (7th Cir. 1961).

³¹ Section 5 of the FTC Act current states that: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45(a)(1) (2010).

practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws.”³² Part of the purpose of the FTC’s existence and discretion in enforcing such vague language is that “[t]he point where a method of competition becomes ‘unfair’ within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.”³³ Due to the PSA being modeled on the FTC Act’s language, we will turn to the FTC Act to help understand the new regulations.

Earlier we stated that the history of the PSA provides inconsistent indicators about whether it was meant to protect consumers or farmers. In using the FTC Act to help understand the PSA, we should be aware that the FTC Act’s Section 5 pertains to consumers while the PSA possibly focuses on business-to-business transactions. However, in determining the statute’s reach such a difference should not matter. For decades, legislatures and courts have enforced laws designed to protect smaller businesses when a significant disparity in negotiating power exists. One of the best examples may be franchisee protection laws.³⁴ Moreover, some courts have held that as remedial legislation, the PSA should be “construed liberally in accord with its purpose to prevent economic harm to [both] producers and consumers at the expense of the middleman.”³⁵ In fact, some acts, while normally supported by national policy

³² *Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

³³ *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 396 (1953).

³⁴ Michael Stumo & Douglas O’Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relations*, 8 Drake J. Agric. L. 91, 108-10 (2003).

³⁵ *Swift & Co. v. US*, 393 F.2d 247, 253 (7th Cir. 1968).

because it would be helpful to consumers, are deemed harmful to the public interest and illegal under section 202 because it may harm small businesses.³⁶

Since the PSA potentially reaches conduct harmful to both consumers and small businesses, it likely reaches farther than any previous antitrust legislation.³⁷

For example, a company's normal refusal to deal is immune from Sherman Act liability absent additional factors.³⁸ No such immunity exists in the PSA, and a company subject to the PSA can suffer liability for refusing to bid against a competitor in purchasing livestock.³⁹

Courts largely support the far reach of the PSA. As the Seventh Circuit stated in *Wilson & Co. v. Benson*:

The legislative history shows Congress understood the sections of the [PSA] under consideration were broader in scope than the antecedent legislation (61 Cong. Rec. 1805 (1921)). To illustrate, Representative (later Speaker) Rayburn, emphasized that although Congress gave the Federal Trade Commission wide powers to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary of Agriculture under the language in section 202(a) and (b) of the [PSA].⁴⁰

However, courts have placed limits on the reach of antitrust. The Sherman Act could render every contract in commerce illegal. Such a construction would be

³⁶ *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (finding that allowing a company's salesmen to sell meat to hotels clients at special discounts in order to win business is a violation of section 202 despite probably not being a violation of other antitrust laws).

³⁷ *Swift v. US*, 393 F.2d 247, 253 (7th Cir. 1968) (stating that the prohibitions of Section 202 of the PSA "are broader and more far reaching than the Sherman Act or even Section 5 of the Federal Trade Commission Act").

³⁸ *US v. Colgate & Co.*, 250 US 300 (1919).

³⁹ *Swift v. US*, 393 F.2d 247, 253 (7th Cir. 1968).

⁴⁰ 286 F.2d 891 (7th Cir. 1961).

absurd.⁴¹ The PSA suffers from a similarly broad reach.⁴² The PSA condemns “any unfair, unjustly discriminatory, or deceptive practice or device.”⁴³ It also condemns “sell[ing] or otherwise transfer[ing] . . . any article for the purpose or with the effect of apportioning the supply between persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly.”⁴⁴ The first restriction’s lack of the second’s qualification about only acts that restrain commerce or create a monopoly indicate that the condition does not apply to the first. Without such a limitation, it is clear that the section (a) is intended to reach conduct not condemned by section (c).

As described above, many courts have interpreted the PSA act broadly. The Secretary of Agriculture and private parties have used the PSA to reach conduct not normally condemned by the previous antitrust laws. However, such broad extension began receiving judicial pushback in recent history. This pushback is a major reason for the newfound need for regulations pursuant to the act.⁴⁵

Judicial Pushback on the PSA

⁴¹ The Sherman Act declares every contract in restraint of trade illegal. 15 U.S.C. § 1 (2010). However, even a normal contract for sale restrains trade by not allowing the item to be sold to someone else. To counter this absurd result, courts imputed a reasonableness requirement into the statute. Now, only unreasonable restraints of trade are deemed illegal.

⁴² Jon Lauck, *supra* note 20 at 490 (describing the broad reach of the PSA).

⁴³ 7 USC § 192(a) (2010).

⁴⁴ 7 USC § 192(c) (2010).

⁴⁵ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35341 (proposed June 22, 2010) (describing how several courts of appeals have interpreted the statute contrary to the USDA’s interpretation).

The PSA's historically long reach began receiving pushback from the judiciary about the time private rights of action were created for violations. Initially, the Seventh, Eighth, and Ninth Circuits heard several cases and found, or refused to find, violations of sections 202(a) and (b) depending upon whether the plaintiffs demonstrated an adverse impact on competition.⁴⁶ Using this precedent, the Fourth, Sixth, Tenth, and Eleventh Circuits recently began requiring a similar, narrow interpretation about the reach of the PSA.⁴⁷ The Sixth circuit perhaps aptly declared that the "prevailing tide of other circuit court decisions" has turned into a "tidal wave."⁴⁸

Taking a closer look at the actions brought before these courts, they are correct that anticompetitive conduct did not occur. For example, in *Terry v. Tyson Farms*, Terry was a chicken grower who sued Tyson Farms, a large chicken processor, for allegedly ending his contract after he tried to organize

⁴⁶ *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (finding no violation because the agreement did not "potentially suppress or reduce competition sufficiently to be proscribed by the Act"); *Farrow v. USDA*, 760 F.2d 211, 214 (8th Cir. 1985) (finding a violation because the agreement not to compete was "likely to reduce competition and prices paid to farmers for cattle"); *De John Packaging Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir. 1980) (finding actions violated the PSA because they were likely to have an adverse impact on competition); *Armour & Co. v. US*, 402 F.2d 712, 722 (7th Cir. 1968) (finding a violation of S 202 requires an adverse impact on competition).

⁴⁷ *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005); *Philson v. Goldsboro Milling Co.*, No. 96-2542, 1998 U.S. App. LEXIS 24630, at *11 (4th Cir. Oct. 5, 1998); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277-79 (6th Cir. 2010).

⁴⁸ *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010). Although *Terry* issued after the regulations were proposed, it follows in the spirit and logic of the other courts of appeals opinions in its holding. As such, it is demonstrative for our purposes.

other chicken farmers.⁴⁹ Terry accused Tyson of refusing to allow him to verify the weight of his shipped chickens and then underpaid him. When he tried to organize other chicken farmers, Tyson terminated his contract, supposedly to silence him. Such unilateral conduct is not a violation of the antitrust laws.⁵⁰

Upset by this change in precedent, the USDA quickly moved to stem the tide. On June 22, 2010, the agency proposed new regulations stating that evidence of an anticompetitive effect is not necessary. These regulations unabashedly and, in fact, quite directly attempt to overturn the narrow rulings from the court of appeals.⁵¹ The new regulations state that an “unfair” practice under the PSA “can be proven without proof of predatory intent, competitive injury, or likelihood of injury.”⁵²

The Proposed Regulations

Fifty years ago, Derek Bok warned about “succumbing to the economists who bid us enter the jungle of ‘all relevant factors,’ telling us very little about the flora and fauna that abound in its depths, but promising rather vaguely that they will do their best to lead us to our destination.”⁵³ The indeterminacy of economic theory can often be its undoing in attempts to provide assistance in antitrust

⁴⁹ Terry, 604 F.3d at 274-75.

⁵⁰ Section 1 of the Sherman Act only reaches agreements. However, the proposed regulations touch on specifically this type of conduct. 75 Fed. Reg. at 35351 (proposing that a retaliatory action in response to a farmer exercising first amendment rights is a violation of Section 202). *See infra* for a discussion on this proposed regulation.

⁵¹ 75 Fed. Reg. at 35341 (describing how several courts of appeals have interpreted the statute contrary to the USDA’s interpretation).

⁵² 75 Fed. Reg. at 35340.

⁵³ Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 227 (1960).

problems. In fact, the injection of economics into antitrust often causes courts to take its fundamental assumptions “on faith.”⁵⁴ By restricting violation of Section 202 to only conduct that restrains trade, courts are injecting an economic inquiry into the statute. The problem is, Section 202(a) and (b) are unclear about whether economics should be a limiting factor.⁵⁵

Under the PSA, the Secretary of Agriculture is allowed to promulgate regulations that help define and enforce the statute. However, the Secretary’s regulating power has limits, otherwise courts would not have been empowered to set aside his orders.⁵⁶ When determining whether the reach of these regulations is too far, we should remember the reasons for their existence. As discussed above, several court opinions contrary to the secretary’s interpretation have been issued. Part of the reason for the regulations being written as they are is to nullify the effect of those opinions.⁵⁷ But there is another reason that should be kept in mind: the Secretary was required by Congress to propose some regulations.⁵⁸

⁵⁴ *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 479 (1992); see Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1065 (1979) (describing the incorporation of economics into antitrust as requiring “large doses of hunch, faith, and intuition.”).

⁵⁵ Recall the discussion about terms not present in these subsections that are present in other parts of the statute.

⁵⁶ 7 U.S.C. § 194(e) (2010).

⁵⁷ 75 Fed. Reg. at 35341 (indicating that the new regulations qualify as a material change and warrant judicial reexamination on the reach of the PSA).

⁵⁸ Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, § 11006 (requiring the secretary to “[a]s soon as practicable, not not later than 2 years after” the enactment of the law, the “Secretary of Agriculture shall promulgate regulations” regarding the PSA).

In the 2008 Farm Bill, Congress included language requiring the Secretary to propose regulations for the PSA.⁵⁹ Congress did not specify what the regulations must say but the Secretary was required to “establish criteria that . . . will [be] consider[ed] in determining” four situations: whether an undue or unreasonable reference occurred in violation of the PSA; whether a live poultry dealer provided reasonable notice to a poultry grower of any suspension of delivery; when a requirement of additional capital investments by a poultry dealer of a poultry grower is a violation of the act; and if a poultry and swine dealer allowed sufficient time for a grower to remedy a breach of contract before being terminated.⁶⁰ This helps explain why several of the provisions in the regulations exist.

As expressed repeatedly, the PSA shares many origins and purposes with the FTC Act. It seems fair then to borrow a standard from that act in determining whether the new regulations promulgated by the USDA comply with the PSA. Several decades ago, the FTC adopted the “Cigarette Rule” to analyze business practices. The rule examines:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3)

⁵⁹ *Id.*

⁶⁰ *Id.*

whether it causes substantial injury to consumers (or competitors or other businessmen).⁶¹

Courts have supported this standard in its application for Section 5 of the FTC Act.⁶²

The proposed regulations contain many significant changes. Examining them all is beyond the scope of this paper. Instead, I will examine several specific sections of the proposed regulations. In examining the sections, I attempt to apply the cigarette rule and examine whether similar requirements have been applied in other laws.

Competitive Injury

The proposed regulations attempt to define competitive injury as: occurring “when conduct distorts competition in the market channel or marketplace.”⁶³ This definition not only attempts to reverse the finding of the several courts of appeals but defines competitive injury far broader than normally found in antitrust. However, what precisely this definition means is unclear.⁶⁴ The term has not been accurately defined in antitrust context or in the statute. Thus, for our purposes, we will instead examine the other definitions in the regulations that do declare specific acts or definitions illegal.

⁶¹ Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8355 (1964).

⁶² *Am. Fin. Serv. Ass’n v. FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985); *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (approving this standard);

⁶³ 75 Fed. Reg. at 35351.

⁶⁴ Running a search in LexisNexis’s all federal courts database for “distorts competition” produces only twenty-four results, none of which explain the term. Search last run May 6, 2011.

Before proceeding, I will reinforce one point. Whatever section 202(a) means, it should not require competitive injury. Section 202(e) of the PSA makes unlawful “any course of business or [] any act for the purpose or with the effect of . . . restraining commerce.”⁶⁵ If section 202(a)’s use of “unfair” is read to include a restraint on commerce, then it is unclear what actions (a) was meant to reach that are not condemned by (e). Section (a) becomes superfluous. Since, Congress is presumed to have meant what it said and to have meant all of what is said, including a ‘competitive injury’ requirement in section (a) seems improper.⁶⁶

Likelihood of Competitive Injury

The proposed regulations contain a sweeping, new definition of ‘likelihood of competitive injury.’⁶⁷ In defining what constitutes a ‘likelihood of competitive injury,’ the regulations include several situations that are illustrative but not limiting on what can be condemned. The situations include where: a packer raises rivals’ costs; uses exclusive dealing to improperly foreclose competition on a large share of the market; and wrongfully depressing prices paid to a grower below market value or impairing a grower to receive “the reasonable expected full economic value from a transaction.”⁶⁸ Like the Sherman Act, these terms, taken for their linguistic value, reach ridiculous ends. After all, it is the purpose of negotiations to attempt to obtain the best value and occasionally to achieve some

⁶⁵ 15 U.S.C. § 192(e) (2010).

⁶⁶ TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

⁶⁷ 75 Fed. Reg. at 35351.

⁶⁸ *Id.*

of that value by taking it from the person across the table. This would seem to possibly forbid anything but a win-win negotiation. Moreover, the regulation does not define how the “full economic value” is determined.⁶⁹

The regulation’s language seems to forbid a packer from depressing prices. But not all purchasing at a lower price can be actionable otherwise the regulation produces absurd results. Courts are loath to condemn conduct that is “the very essence of competition.”⁷⁰ The question then becomes at what point does purchasing at lower prices become a violation.

Under other antitrust laws, a buyer is not typically required to inform the seller that it underbid its competitors.⁷¹ Most antitrust laws also do not deal with a situation where the buyer may be in violation due to paying too little.⁷² The only law that contains a provision dealing with a violation for paying too little is the Robinson-Patman Act.⁷³ In *A&P*, the Supreme Court examined the portion of the Robinson-Patman Act which deals with buyers “[k]nowingly inducing or receiving a discriminatory price.”⁷⁴ The case dealt with A&P, a grocery chain, which conducted tough negotiations with one of its distributors for dairy

⁶⁹ Is it the economic value perceived by the seller? The buyer? Some independent, objective party?

⁷⁰ *Weyerhaeuser Co v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007).

⁷¹ *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979).

⁷² *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), dealt with a monopsony where the buyer alleged overpaid in order to drive out competition. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, dealt with a buyer underselling their product in order to drive out competition. Both cases established high bars for such allegations to constitute a violation of the Sherman Act.

⁷³ 15 U.S.C. § 13(f) (2010) (making it illegal to induce a violation of the act by a seller).

⁷⁴ *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. at 71; 15 U.S.C. § 13(f) (2010).

products.⁷⁵ Without lying, A&P was able to possibly mislead its main supplier into offering a bid substantially lower than its competitors.⁷⁶ The Supreme Court held that such conduct did not constitute a violation of the act.⁷⁷ The Court reasoned that since a buyer's liability under the Act derived from the supplier's liability, no violation could exist unless the supplier was similarly liable.⁷⁸ In A&P, since the buyer had provided vague and merely possibly misleading information, the supplier had an affirmative defense that it reasonably believed it was merely matching the market.⁷⁹ Without the seller conducting a sanctionable act, the buyer could not be punished. From this we learn that if a buyer is immune from all conduct except possibly lying to the supplier, then it is extremely rare that a buyer will be held liable for accepting, or inducing, a lower bid from a supplier.

Due to the narrow reading of the Robinson-Patman Act for liability of buyers, the proposed regulations likely deserve a similarly narrow reading in terms of the "expected full economic value." Normal bargaining should not constitute a violation, even when the results lead to pricing below the seller's expected value. Instead, liability should be limited to situations where the buyer lies to the seller, an act that could be reprehensible under fraud already.

Justifying Price Discrepancies

One of the evils Congress created section 202(a) to solve included eliminating sales below cost where the packer intended to eliminate competitors

⁷⁵ Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. at 72.

⁷⁶ *Id.* at 71, 81 n. 15.

⁷⁷ *Id.* at 83-84.

⁷⁸ *Id.* at 76-77.

⁷⁹ *Id.* at 83-84.

or injure competition through geographic price discrimination.⁸⁰ As told by the Secretary of the American National Livestock Association who testified in one of the hearings leading to the PSA:

"In earlier periods the packers did use every available method to drive the small independents out of business. They would, so I am credibly informed, undersell them in localities until they entailed upon these independents so severe losses that they either had to go out or be absorbed. Of course, a big institution like one of the five packers could well afford to do this and absorb the losses that might be caused by this underselling in other branches and make it up later on after they had eliminated that competition."⁸¹

The proposed regulations declare that the PSA's prohibition of "unfair, unjustly discriminatory and deceptive practice[s] or device[s]" includes paying a premium or discount to a producer "without documenting the reason(s) and substantiating the revenue and cost justification associated with the premium or discount."⁸² Thus, a packer is not required to pay every grower an equal amount,⁸³ but is required to maintain documents that justify variances in the prices paid to growers for future investigations. Such document requirements are not unprecedented for regulated industries.⁸⁴

⁸⁰ See Hearings on Meat Packer Legislation before the House Committee on Agriculture, 66th Cong., 2d Sess. 2211, 2657 (1920).

⁸¹ *Id.*; see also Report of the Federal Trade Commission on the Meat-Packing Industry, Part IV 235-36 (1919).

⁸² 75 Fed. Reg. at 35351.

⁸³ Farm Bill Regulations – Misconceptions and Explanation, *available at* archive.gipsa.usda.gov/psp/rulefacts.pdf (last viewed on May 4, 2011).

⁸⁴ The FDA requires recordkeeping of companies involved in the storage and sale of food for national security purposes. See *Bioterrorism Act of 2002*, 69 Fed. Reg. 71561 (Dec. 9, 2004).

Facts giving rise to a violation of the Robinson-Patman Price Discrimination Act⁸⁵ have been held to also violate the PSA.⁸⁶ In *Wilson & Co. v. Benson*, Wilson had recently dismissed its manager for the San Francisco market.⁸⁷ In the following weeks, Wilson also lost 75% of its business to the former manager's new company, a non-compete clause was not in his contract. To regain the business, Wilson instructed its sales personnel to offer discounts beyond the normally authorized range.⁸⁸ The administrative judge of the Department of Agriculture found that Wilson cut prices so significantly that it lost over \$152,000. However, the price-cutting worked and Wilson regained a significant portion of its business.⁸⁹ The Seventh Circuit affirmed the Department of Agriculture's finding that Wilson violated section 202(a) of the PSA because the statute also covers conduct that would violate the Robinson-Patman Act.⁹⁰ Notably, Wilson did not appeal the administrative judge's requirement to maintain records on sales similar to those proposed in the regulation.⁹¹ While seemingly far reaching, one of the clear purposes of the PSA is to help prevent unjustified price discrimination.

⁸⁵ Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13(b), 21(a) (2010) (original version at ch. 592, 49 Stat. 1526 (1936)).

⁸⁶ *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (finding that "[t]he language in section 202(a) includes practices which might be a violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act").

⁸⁷ 286 F.2d 891, 893 (7th Cir. 1961).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 895.

⁹¹ *Id.* at 894.

The requirement to maintain documents does not require identical pricing among growers. As such, while the added cost of keep such files may be significant for large packers, it seems like a reasonable requirement to advance the interest of both the PSA and other antitrust laws.

Forcefully Providing Information

The proposed rules not only require restraint from particular action against growers but also require some affirmative actions. Among those is the duty to provide “upon request, the statistical information and data used to determine compensation paid to the contract grower . . . under a production contract, including, but not limited to, feed conversion rates, feed analysis, origination and breeder history.”⁹² A production contract is a contract that “details specific . . . responsibilities for production inputs and practices, as well as a mechanism for determining payment.”⁹³ This definition is in tension with the PSA’s statutory definition of “swine production contract.”⁹⁴ For our purposes, which definition is correct does not matter. The most important issue is the required disclosure of information to a counterparty during negotiations.

⁹² 75 Fed. Reg. at 35351.

⁹³ 75 Fed. Reg. at 35350-51.

⁹⁴ The PSA defines “swine production contract” as “any growout contract or other arrangement under which a swine production contract grower raises and cares for the swine in accordance with the instructions of another person.” 7 U.S.C. § 182(a)(13) (2010).

Forcing disclosure of information is not common but also is not rare.⁹⁵ In heavily regulated industries, the Supreme Court has implicitly upheld such disclosures.⁹⁶ In fact, in the food context, the government requires certain disclosures to the public all the time.⁹⁷

That the USDA would require certain pricing disclosures here is not wholly outside the normal so long as it furthers a significant interest. Interestingly, at least one state has tried to implement a pricing disclosure similar to the one required in this regulation.⁹⁸ Addressing that statute the district court held that the availability of pricing information is in the national interest by increasing competition:

It is in the national interest to encourage and protect family farms and ranches and to enhance and promote the stability and well being of rural America. More competitive markets would result in higher prices to producers. Equal access to accurate pricing and purchase information would improve the competitiveness of the livestock market. Poor or no information can lead to unnecessary price volatility and tardy or inaccurate adjustments to changing supply and demand conditions. Inadequate or uneven information can cause producers to be disadvantaged, relative to packers. Disclosure of prices fosters competition and results in an efficient functioning of the market. Disclosure significantly reduces distrust and a certain amount of hostility which now exists between producers and packers. Information concerning prices paid by

⁹⁵ See 15 U.S.C. § 1679(c) (2010) (requiring mandatory disclosures for credit reporting agencies); *see also* 12 C.F.R. 226 (outlining the mandatory disclosures from the Truth in Lending Act).

⁹⁶ See *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) (holding that the government can forced parties to disclose information and settle on a price directly instead of requiring the information be disclosed to the government, the government settling on a price to convey the information, and the government paying a portion of the settlement to the other party).

⁹⁷ See generally PETER BARTON HUTT, et. AL. *FOOD AND DRUG LAW: CASES AND MATERIALS* 92-152 (3d Ed. 2007) (discussing food labeling requirements).

⁹⁸ *American Meat Institute v. Barnett*, 64 F.Supp. 2d 906, 919-20 (D.S.D. 1999).

packers for livestock enables producers to be more competitive, to make management changes, including risk management decisions, and to better determine what type livestock can be produced most profitably.⁹⁹

While the law was declared unconstitutional under the principle of the dormant commerce clause,¹⁰⁰ the USDA is not constrained by such considerations.

The required disclosure runs into a problem in that all of the previously mentioned disclosures, with the exception of some FDA disclosures, are required by statute, not regulation. Even the Truth in Lending Act disclosures draw most of their language from the authorizing Congressional action.¹⁰¹ In the proposed disclosures to growers, the USDA may be stretching beyond its authorization and interpretation of the term “unfair” in requiring these disclosures.

Freedom from Retaliation & Coercion

The proposed regulations seek to limit a packer’s contractual freedom by placing limits on how a packer can terminate a grower.¹⁰² One such limitation is by prohibiting “retaliatory action or omission . . . in response to the lawful expression, spoke or written, association, or action of a [grower].”¹⁰³ The regulation goes on to define a retaliatory action to

⁹⁹ *American Meat Institute v. Barnett*, 64 F.Supp. 2d 906, 919-20 (D.S.D. 1999) (finding a state statute forcing packers to disclose pricing information furthers both national and local policies but is unconstitutional because it violates the dormant commerce clause).

¹⁰⁰ *Id.* at 918-22.

¹⁰¹ 15 U.S.C. § 1601-67(f) (2010).

¹⁰² 75 Fed. Reg. at 35351.

¹⁰³ *Id.*

include but not be limited to “coercion, intimidation, or disadvantage to any [grower] in an execution, termination, extension or renewal of a contract involving livestock or poultry.”¹⁰⁴ While the historic freedom to contract is still quite broad, certain restrictions do exist.

Congress has created a cause of action in a specific instance where one party cancels a contract in an attempt to coerce the other.¹⁰⁵ An automobile franchisee possesses a cause of action when the automobile manufacturer does not act in good faith in performing or terminating the franchisee.¹⁰⁶ The term “good faith” applies throughout the entire term of the contract and is defined “so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation.”¹⁰⁷ Exactly what conduct constitutes coercion and intimidation must be judged on the specific facts of the case. Moreover, if no actual injury occurred, the alleged coercion must be the type of conduct that a reasonable man would consider a threat.¹⁰⁸ Once these

¹⁰⁴ *Id.*

¹⁰⁵ Automobile Dealers’ Day in Court Act (“ADDCA”), 15 U.S.C. §§ 1221-1225 (2000).

¹⁰⁶ 15 U.S.C. § 1222 states:

“An automobile dealer may bring suit against any manufacturer engaged in commerce . . . , and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer”

¹⁰⁷ 15 U.S.C. § 1221(e) (2010); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir. 1963) (holding that good faith should be confined to acts of coercion or intimidation); *Hanley v. Chrysler Motor Corp.*, 433 F.2d 708 (10th Cir. 1970) (same).

¹⁰⁸ *Overseas Motor, Inc. v. Import Motors, Ltd.*, 375 F. Supp. 499 (E.D. Mich. 1974), *aff’d* 519 F.2d 119 (6th Cir. 1975).

requirements are satisfied, a dealer can pursue a cause of action against a manufacturer for unjustly terminating his contract.

Similarly, the Third Circuit has upheld a preliminary injunction barring an antitrust defendant from cutting service to its plaintiff-customer.¹⁰⁹ In *Bergen*, the plaintiff was a customer of the defendant and also brought an antitrust action against the defendant.¹¹⁰ Promptly after learning of the antitrust lawsuit, the defendant notified the plaintiff that it was ceasing business relations.¹¹¹ The plaintiff filed and received a preliminary injunction ordering the continuing sale of items to the plaintiff.¹¹² The court's primary purpose in granting the injunction was because it frustrated the initial antitrust litigation.¹¹³

On its face, the proposed regulations do not prohibit retaliatory actions meant to stop antitrust violations. However, that may have been the underlying reason for the regulation. In *Terry*, discussed above, Terry attempted to organize growers against Tyson Farms because of Tyson's alleged under weighing of his chickens. The key difference between *Terry* and *Bergen* is that Terry did not file an antitrust complaint. This difference

¹⁰⁹ *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *but see* *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962) (holding that a refusal to deal is within the defendant's right even if the refusal stems from the plaintiff bringing an action in court for violation of the antitrust laws).

¹¹⁰ *Id.* at 726.

¹¹¹ *Id.*

¹¹² *Id.* at 729.

¹¹³ *Id.* at 727.

is significant because normally the Court recognizes a broad power for a business to choose to its customers.¹¹⁴

While Congress has created a cause of action for car dealer franchisees, it did so explicitly in a statute. In the proposed regulations, the USDA is attempting to create a cause of action merely through regulations. The creation of such a requirement has occurred in antitrust laws, as seen in *Bergen*, but it was limited to a case where the retaliatory action was intended to frustrate existing antitrust laws. Here, the regulations stretch far beyond retaliatory action that frustrates the antitrust laws, it reaches conduct that is purely speech. Such an extension of the antitrust laws, without explicit Congressional approval, is likely a step too far for the regulations.

Nullifying Refusal to Deal

The proposed regulations also curtail a packer's freedom to contract by limiting how a grower, believed to be in breach of the contract, can be terminated. The regulations include within the definition of "unfair, unjustly discriminatory and deceptive" the termination of a grower "with no basis other than the alleged by the packer . . . that the [grower] failed to comply with an applicable law, rule or regulation."¹¹⁵ If the packer believes the grower is in violation, the packer "must immediately report the alleged

¹¹⁴ See *US v. Colgate & Co.*, 250 U.S. 300 (1919) (holding that a company can specify a price for its product and has the right to unilaterally cut off any customer that does not abide by the suggested resale price).

¹¹⁵ 75 Fed. Reg. at 35351.

violation to the relevant law enforcement authorities if they will to use this alleged violation as grounds for termination.”¹¹⁶ This prohibition for canceling a contract appears unprecedented in antitrust and consumer protection laws. Even the Automotive Dealer Franchise Act does not extend this far.¹¹⁷ Normally the antitrust laws protect a company’s refusal to deal with a customer. The Robinson-Patman Act explicitly supports such freedom from restraint. In fact, it provides that “nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint in trade”¹¹⁸ After all, “even a firm with significant market power has no duty to deal with certain suppliers or distributors, unless it can be shown that its decisions are part of a broader effort to maintain its monopoly power,” an action that would possibly be independently actionable.¹¹⁹

Ever since before the PSA, the Supreme Court has recognized that the Sherman Act does not prohibit a company’s unilateral decision to terminate a customer is not actionable in the vast majority of cases.¹²⁰ More recently, in *NYNEX Corp. v. Discon, Inc.*, the Court refused to find the termination of a supplier per se illegal, even where there was no

¹¹⁶ *Id.*

¹¹⁷ The Act does not discuss any requirements for reporting violations of regulations before allowing termination.

¹¹⁸ 15 U.S.C. § 13(a) (2010).

¹¹⁹ *Goldwasser v. Ameritech, Inc.*, 222 F.3d 390, 398 (7th Cir. 2000).

¹²⁰ *US v. Colgate Co.*, 250 U.S. 300 (1919).

alleged efficiency justification for the termination.¹²¹ The only times the Court has condemned monopolists for refusing to deal occurred in cases of a monopolist terminating an existing relationship,¹²² but such a requirement is rarely enforced on non-monopolists. Even the cases against monopolists for terminating a business relationship have received skepticism from the Court, with one of them recently being called “at or near the outer boundary of [section 2] liability.”¹²³

Courts have consistently refrained from enforcing a duty to deal on companies and this regulation should not be exempt from such considerations. By its text, the regulation applies to terminations “with no basis other than the allegation” or violating a law, rule, or regulation.¹²⁴ Following a strict reading, it is possible to interpret it as only applying to situations where a violation is the only justification. A packer’s desire to cancel the contract, or even materially breach it, would fall outside the regulation’s text because then there would be a basis other than an alleged violation: the packer’s desire to cancel.

If such a narrow reading is rejected, the regulation could still be quite toothless. The test requires a packer to “immediately report the

¹²¹ 525 U.S. 128 (1998).

¹²² *See* *Otter Tail Power Co. v. US*, 410 U.S. 366, 377-78 (1973); *see also* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

¹²³ *Verizon Commns. Inc. v. Trinko*, 540 U.S. 398, 408 (2004). Section 2 refers to the Sherman Act’s monopolization section.

¹²⁴ 75 Fed. Reg. at 35351.

alleged violation to the relevant law enforcement authorities.”¹²⁵ No requirement that the allegation be confirmed or that the packer even wait for the conclusion of an investigation. After all, the packer has no guarantee that the relevant authority will pursue the report and conduct an investigation. If all the packer must do is send a letter, then a packer can easily satisfy the regulation.¹²⁶ These narrow readings suggest that this regulation, despite having a far-reaching tone, could be harmless.

Conclusion

The proposed regulations should be interpreted to provide less expansive coverage than an initial first gloss suggests. In the PSA context, private plaintiffs can bring suit for violation of these regulations.¹²⁷ A material breach of contract should be a suit between the packer and grower, the USDA should not get involved and make it also a violation of regulatory law.¹²⁸

Moreover, even if only the USDA brought actions under the proposed rules, they are nearly limitless. By defining “likelihood of competitive injury” to include situations where a packer “wrongfully depresses prices paid to a producer” or “impairs a producer’s . . . ability to . . . receive the reasonable expected full economic value from a

¹²⁵ *Id.*

¹²⁶ Of course, the packer cannot make up information and possibly violate other laws by submitting a false report.

¹²⁷ 7 U.S.C. § 209 (2010).

¹²⁸ 75 Fed. Reg. at 35351.

transaction”¹²⁹ During a negotiation, what action does not impair the opposing side’s ability to receive its full expected value? It is in the best interest of the buyer to pay less for each good and it is in the best interest of the seller to receive more. Rarely will each side’s expected values perfectly line up. So which value becomes the reasonably expected full economic value? The buyer’s or the seller’s? Perhaps some undefined third value is created? Without such guidance, packers will possibly be subject to suit every time a grower feels slighted by a negotiation.

Moreover, the proposed regulations make at least one significant error: they do not explicitly state that precompetitive justifications for price discrepancies will be taken into consideration when a future investigation occurs. The USDA does state that it “would consider . . . whether there is a legitimate justification” for a pricing disparity, but that statement is in the explanation of the proposed regulations, not in the regulations themselves.¹³⁰ Looking at the FTC Act’s Section 5, Congress explicitly requires that an act or practice cannot be considered “unfair” unless the FTC “is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹³¹ It is unlikely that Congress would approve of any actions without considering the precompetitive effects. As such, courts should hold that any alleged violation of

¹²⁹ 75 Fed. Reg. at 35351.

¹³⁰ 75 Fed. Reg. at 35343.

¹³¹ 15 U.S.C. § 45(n) (2010).

these regulations include an analysis into the possible precompetitive effects of the alleged conduct.

The proposed rules were meant to counteract the ‘tidal wave’ of courts narrowing section 202(a) and (b). However, these proposed rules wouldn’t just stop the water, it’d send the tide back in the opposite direction. While some of the regulations can be quite ineffective if interpreted narrowly, others impose overly broad requirements. The USDA should reexamine the proposed regulations and look toward the FTC in figuring out what types of analysis are appropriate in condemning ‘unfair’ conduct.